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THE SPOUSES' DEATH ALLOWANCE IN PENNSYLVANIA

The so-called allowance, as provided by Section 2 (a) of the Intestate Act of June 7, 1917, P. L. 429, as amended by the Act of July 11, 1917, P. L. 755, is a part of the feminist movement in Pennsylvania for equal rights, first appearing in Section 6 of the Act of April 11, 1848, P. L. 536, known as the Married Woman's Separate Property Act, and last exemplified in the Act of May 13, 1925, P. L. 687, amending Section 2 (c) of the Fiduciaries Act of June 17, 1917, P. L. 447, placing on a parity the claims of the husband and wife to letters of administration in the estates of each other, and also abrogating the ancient preference of males over females in the grant of administration by the Register of Wills.

To the end that the present day law concerning the $5,000 allowance be comprehended, it is expedient to review

prior legislation and decisions of the courts applicable to cases of spouses dying without issue.

Intestate Act of 1833.

The Intestate Act of April 8, 1833, P. L. 315, provided, inter alia, as follows:

"Article 2. Where such intestate shall leave a widow and collateral heirs, or other kindred, but no issue, the widow shall be entitled to one-half part of the real estate, including the mansion house and buildings appurtenant thereto, for the term of her life, and to one-half part of the personal estate absolutely."

"Article 3. Where such intestate shall leave a husband, he shall take the whole personal estate, and the real estate shall descend and pass as is heretofore provided, saving to the husband his right as tenant, by the curtesy which shall take place, although there be no issue of the marriage in all cases where the issue, if any, would have inherited."

Section 15 of the same Act stated that the shares allotted under the provisions of the Act to the widow should be "in lieu and full satisfaction of her dower at common law."

Election by Widow.

Section 11 of the Wills Act of April 8, 1833, P. L. 249, provided:

"That a devise or bequest by a husband to his wife of any portion of his estate or property, shall be deemed and taken in lieu or bar of her dower in the estate of such testator, in like manner as if it were so expressed in the will, unless such testator shall in his will declare otherwise: Provided, that nothing herein contained shall deprive the

widow of her choice either of dower, or of the estate or property so devised or bequeathed."

Section 11 of the Act of April 11, 1848, P. L. 536, further explains and construes the section just quoted in the following language:

"That the eleventh section of the act of eight April, one thousand eight hundred and thirty-three, entitled "An Act relating to last wills and testaments," shall not be construed to deprive the widow of the testator in case she elects not to take under the last will and testament of her husband of her share of the personal estate of her husband under the intestate laws of this commonwealth, but that the said widow may take her choice, either of the bequest or devise made to her under any last will and testament, or of her share of the personal estate under the intestate laws aforesaid."

Section 1 of the Act of April 20, 1869, P. L. 77, provided further:

"That in case any person has died, or shall hereafter die, leaving a widow and last will and testament, and such widow shall elect not to take under the will, in lieu of dower in the common law, as heretofore, she shall be entitled to such interest in the real estate of her deceased husband as the widows of decedents dying intestate are entitled to under the existing laws of this commonwealth."

The net result of the statutes already quoted was that in case a husband died testate, without issue, but leaving a widow surviving, the latter, if dissatisfied with the provisions of her husband's will, could elect to take under the Intestate Laws instead, and under these laws the widow was entitled to an interest for life in one-half of the net value of the real estate of which her husband died seized and one-half the net value of the personalty absolutely."

Election by Husband.

Section 7 of the Act of April 11, 1848, P. L. 536, conferred upon the married woman the right to dispose of her separate property, real, personal or mixed, by will, and Section 9 of the same act provided for the distribution of the personal estate of a married woman, inter alia, by specifying that if she died without issue, leaving a husband surviving, the latter should be entitled to all of the personal estate absolutely.

Section 10 of the same Act provided for the distribution of the real estate of a married woman upon her decease, as already set forth in the Intestate Laws of the Commonwealth, but with the proviso that nothing in the act should be deemed or taken to deprive the husband of his right as tenant by the curtesy.

The net result of the statutes cited was that in case the wife died testate ,without issue, but leaving a husband surviving, the latter, if dissatisfied with the provisions of his wife's will in regard to his interest, could elect to take in lieu thereof his curtesy rights in all of the real estate of which the wife died seized.

It will be observed, therefore, that in the example of the husband rejecting the provisions of the will of his wife, he did not take the same interest as he would have taken had she died intestate, namely, his curtesy rights, plus all of the personalty absolutely, but on the hypothesis of testacy and the rejection of the terms of the will, he was confined to the life interest in the real estate, as heretofore described.

Act of May 4, 1855.

The peculiar result of the statutes upon the interest of the husband in case of rejection of the provisions of the

wife's will, as referred to, gave rise to the enactment of Section 1 of the Act of May 4, 1855, P. L. 430, thus stipulating:

"That the power of any married woman to bequeath or devise her property by will, shall be restricted, as regards the husband, to the same extent as the husband's power so to dispose of his property is restricted, as regards the wife, namely: So that any surviving husband may, against her will, elect to take such share and interest in her real and personal estate as she can when surviving, elect to take against his will in his estates, or otherwise to take only her real estate as tenant by the courtesy."

By the terms of this law, the surviving husband of a wife dying testate might select from three situations:

1. Accept the provisions of the will.

2. Reject the provisions of the will and elect to take the same interest in the wife's estate as she would have taken in his estate had she survived.

3. Elect to take his curtesy rights in all her lands.

Allowance Act of 1909.

The provisions of the Intestate Act of 1833, already quoted, remained intact as the law of the state until changed by the Act of April 1, 1909, P. L. 87, Article 2 of the Act of 1833, being amended to read as follows:

"Where such intestate shall leave a widow, and collateral heirs or other kindred, but no issue, such widow shall be entitled to the real or personal estate, or both, to the aggregate value of five thousand dollars, in addition to the widow's exemption as allowed by law; and if such estate shall exceed in value the sum of five thousand dollars, the widow shall be entitled to such sum of five thousand dollars, absolutely, to be chosen by her from the real or per-

sonal estate, or both; and, in addition thereto, shall be entitled to one-half part of the remaining real estate, for the term of her life, and to one-half part of the remaining personal estate, absolutely: Provided, That the procedure for appraising and setting apart the said five thousand dollars in value of property shall be the same as provided in section five of the Act of Assembly, approved April fourteenth, one thousand eight hundred and fifty-one, relating to widow's exemptions."

Article 3 of the Act of 1833 was likewise amended to read as follows:

"When such intestate shall leave a husband, the real estate shall descend and pass as now provided by law, saving to the husband his right as tenant by the courtesy, which shall take place, although there be no issue of the marriage, in all cases where the issue, if any, would have inherited. If such married woman shall leave no children, nor descendants of such living, the husband shall be entitled to such personal estate absolutely. If such married woman shall leave a child or children living, her personal estate shall be divided amongst the husband and such child or children, share and share alike; if any such child or children, being dead, shall have left issue, such issue shall be entitled to the share of the parent.

Section 2. All acts or parts of acts inconsistent herewith be and the same are hereby repealed."

Constitutionality.

In Gilbert's Estate, 227 Pa. 648 (1910), the Act of 1909 was attacked on constitutional grounds in that it violated Sections 3, 6 and 7, of Article 3, of the Constitution of 1874. The Supreme Court held, nevertheless, that these provisions of the organic law were not contravened and that the Act was a valid exercise of legislative power.

In Guenthoer's Estate, 235 Pa. 67 (1912), in an elaborate opinion the Supreme Court again passed upon the constitutionality, stating that the Act did not violate Article 3, Section 6, of the Constitution. Again, in Deegan's Estate, 235 Pa. 88 (1912), and in Mercer's Estate, 235 Pa. 178 (1912), the Act was held constitutional.

Widow's Claim.

In Guenthoer's Estate, 235 Pa. 67 (1912), it was contended, inter alia, that the act only applied to the estates of intestates to which contention Mestrezat, J. replied, referring to the Act:

"It did not intend to make a distinction between widows whose husbands died without wills and those who elected to take against their husband's wills, thereby creating a partial intestacy. There was certainly no intention on the part of the Legislature in passing the Act of 1909 to make a distinction, and to give the widow of the husband dying intestate $5,000 more than the widow who elects to take against her husband's will, and, therefore, under the Intestate Laws. Such distinction does not clearly appear by by the Act of 1909 and hence it will not be presumed that the legislature intended it. The purpose of the Act of 1909 was simply to give to the widow of a decedent who died without issue the sum of $5,000 in addition to that part of his estate given her by the Intestate Act of April 8, 1833. We have construed the provisions of that act applying to such widows, and held that on her election she had the right to take the portion of the decedent's estate given her by that statute."

Husband's Claim.

The Act of 1909 makes no reference to the rights of husbands in the estates of wives dying testate and without issue, hence in Moore's Estate, 50 Superior Ct. 76 (1912) it

was held that by virtue of the Act of April 1, 1909, P. L. 87, and its application to the first section of the Act of May 4, 1855, P. L. 430, a husband surviving his wife who died testate could reject the provisions of the will and file his election to take the same share in her estate as she would have taken in his had he died intestate, thus giving him the option to take the $5,000 allowance.

In Buckland's Estate, 239 Pa. 608 (1913), it was held that the husband having elected to take at law rather than under the will of his wife, who died without issue, the interest of the husband would become vested and in case of his death the $5,000 would be set aside under the provisions of the Act, notwithstanding that he did not make any specific claim for such an amount in his election. The administrator of the husband could, therefore, proceed to have the appraisement made in accordance with the provisions of the Act.

On the other hand, in Ellermyer's Estate, 255 Pa. 610 (1917), the wife died **intestate** and the husband claimed the $5,000 allowance under the provisions of the Act of 1909, but the Supreme Court held, affirming the decree of the lower court, that where the wife died **intestate,** the provisions of Article 3, Section 1, of the Act of April 1, 1909, P. L. 87, applied, and, therefore, the husband could only claim this allowance **as against the will** of the wife and not where she died intestate.

No Issue—Act of May 4, 1855.

In Mallon's Estate, 253 Pa. 29 (1916), the wife died testate without issue, leaving to survive her a husband who had issue by a former marriage. The husband elected to take against the will of the wife and under the provisions of the Acts of May 4, 1855, and April 1, 1909. It was contended that in the matter of his election to take the same interest in her estate that she would have taken in his had

he died, he would by the fact of her taking subject to his issue, be precluded from taking the $5,000 under the terms of his election as against her will. Said Broomall, J.:

"If this husband had died first, she would not, it is true, have been entitled to five thousand dollars, under the Act of 1909, and hence construing the Act of 1855, by its application to this particular case, and guided by the words 'so that any surviving husband may against her will elect to take such share and interest in her real and personal estate as she can, when surviving, elect to take against his will in his estate,' it would follow that he would not be entitled to this five thousand dollars. But these words have received judicial construction in Seltzer's Est., 189 Pa. 574, and are subordinated to the paramount intent, expressed in the former part of the act in the words 'the power of any married woman to bequeath or devise her property by will shall be restricted as regards the husband to the same extent as the husband's power so to dispose of his property is restricted as regards the wife.' In other words, the right of the husband or wife in the estate of the other, as against the will of the other depends on whether the decedent left issue, and is in no wise affected by whether the survivor had issue, and to this extent they are put on a parity. This decision was before the Act of 1909, but the portion in the Act of 1909, passes as a descent: Guenthoer's Est., 235 Pa. 67; Moore's Est., 50 Pa. Superior Ct. 76, and the same principles apply; Gilbert's Est., 227 Pa. 648. Our conclusion is in accord with that reached by Judge Steel, in Reamer's Est., 4 Lehigh County L. J. 331."

This opinion was affirmed per curiam by the Supreme Court.

No Issue—Adoption.

In McQuiston's Estate, 238 Pa. 313 (1913), it was held that where the decedent had died leaving to survive him a

widow and a child who had been legally adopted by the decedent, the widow was not entitled to claim the $5,000 allowance under the Act of April 1, 1909, P. L. 87.

Not An Exemption Act.

The Act of 1909 stipulated that the procedure for appraising and setting apart the $5,000 in value of property should be similar to that relating to widows' exemptions in the Act of April 14, 1851, and in many of the cases construing the Act of 1909, the courts inadvertently refer to the allowance as an "exemption." However, said Elkin, J., in Gilbert's Estate, 227 Pa. 648 (1910):

"The title to the Act of 1909 declares that it is an act relating to descent and distribution, and we do not see how the courts can say that the legislature was mistaken and did not intend it to mean what it says. It is not an exemption law and was not intended as such. It is true that the setting aside of the property which passes to the widow under this act is according to the method provided by the Act of 1851, but this has only to do with the procedure and does not affect the right of inheritance which is conferred by other portions of the Act as amended."

In Styers's Estate, 42 C. C. 623 (1914), it was declared that the Act of 1909 is a statute relating to descent and consequently, where a man dies leaving a widow and no issue, but collateral heirs, and the widow dies before appraisement of the real estate is made, the administrator of the deceased husband will be directed to appraise the real estate to the value of $5,000 for the benefit of the widow's estate.

Intestate Act of 1917.

It has been observed that the Allowance Act of 1909, as construed by the courts, provided for the $5,000 to the widow of an intestate, dying without issue, and also to the widow of a testate, dying without issue, by the election of

the widow to take against the will. On the other hand, the husband of a wife dying intestate without issue, could not claim the allowance, whereas, the husband of a wife dying testate, without issue, could by the rejection of the terms of the will and the election to take be thus entitled to the $5,000 distribution.

The Intestate Act of 1917 made the following prominent changes in the law of intestacy as it applies to our topic:

1. The life estates of the spouses were changed to absolute interests.

2. The interests of the spouses were made equal.

3. The special allowance was retained but made to apply only to cases of actual intestacy, whole or partial.

Section 2 (a) of the Intestate Act of June 7, 1917, P. L. 429, reads thus:

"Where such intestate shall leave a spouse surviving and other kindred, but no issue, the surviving spouse shall be entitled to the real and personal estate, or both, to the aggregate value of $5,000, in addition, in the case of a widow to the widow's exemption as allowed by law; and, if such estate shall exceed in value the sum of $5,000, the surviving spouse shall be entitled to the sum of $5,000 absolutely, to be chosen by him or her from real or personal estate, or both, and in addition thereto, shall be entitled to one-half part of the remaining real and personal estate: Provided, that the provisions of this clause shall apply only to cases of actual intestacy of husband or wife, entire or partial, and not to cases where the surviving spouse shall elect to take against the will of the deceased spouse."

The language of the proviso having been found inappropriate to express the meaning that the draftsman wished to convey, the section was amended by the Act of July 11, 1917, P. L. 755, so as to read as follows:

"Provided, that the provisions of this clause as to the said $5,000 in value shall apply only to cases of actual intestacy of husband or wife, entire or partial, and not to cases where the surviving spouse shall elect to take against the will of the deceased spouse."

Allowance—Testacy.

Despite the plain language of the proviso as amended, it was contended in Langerwisch's Estate, 47 C. C. 121 (1919), that the surviving spouse taking against the will of her deceased husband was entitled to the $5,000 in value as provided in cases of actual intestacy. Shull, P. J., after citing Section 2 (a) of the Intestate Act of 1917 with the amendment, and discussing the same and also citing the Wills Act of June 7, 1917, declares:

"The situation confronting us is the provision of the wills act that the spouse taking against the will shall take as he or she would have been entitled to had the testator died intestate and the provisions of Section 2 (a) of the intestate act as amended. The intention of the legislature to distinguish between a surviving spouse of a testate and an intestate is perfectly apparent from the text of the proviso in the intestate act. With no other law in the statutes of the commonwealth providing what should be taken by the surviving spouse of a deceased testate who might elect to take against the will, this would have barred him or her from participating in the distribution of the estate. With the provision which is contained in the wills act, it might have been construed that the surviving spouse take in the same manner and amount as the surviving spouse of an intestate. That, however, is not before the court for determination, but the intention of the legislature to place them on a different basis as to inheritance is emphasized by the amendment of July 11, 1917, P. L. 755. Clearly, it was the intention of the legislature that the surviving spouse of one

dying testate, who elected to take against the will, should not enjoy the full benefits enjoyed by the surviving spouse of an intestate and that she should not enjoy the benefits of the five thousand dollars in value. Therefore, we hold that the surviving spouse of one dying testate, electing to take against the will of the deceased spouse, is not entitled to the five thousand dollars in value, but takes in accordance with the provisions of Section 2 (a) of the act of assembly of June 7, 1917, P. L. 429, as amended by the act of July 11, 1917, P. L. 755."

In Collom's Estate, 47 C. C. 434 (1919), Prather, P. J. of the Orphans' Court of Crawford County came to the same conclusion as in the previous case.

The Langerwisch case subsequently reached the Supreme Court resulting in an affirmation of the decree of the lower court in 267 Pa. 319 (1920).

In Lucas's Estate, 277 Pa. 553 (1923), it was again held by the Supreme Court that a widow who elects to take against her husband's will is not entitled to the allowance of $5,000 as provided by the Intestate Act of 1917.

In Mitchell's Estate, 79 Superior Ct. 208 (1922) a husband elected to take against the will of his deceased wife, and laid claim to the $5,000 special allowance under the Intestate Act of 1917. Said the Court:

"This claim cannot be allowed. When the husband elected to take against the will he became entitled to one-half of the estate as in cases of intestacy and in no circumstance can he get more; Lee's Appeal, 124 Pa. 74, though arising under a different statute is analogous, and so is Hollinger's Estate, 259 Pa. 75. Moreover, the right of a surviving husband to the $5,000 special allowance in cases of intestacy under section 2 (a) of the Intestate Act of 1917

has expressly no application to cases where the husband elects to take against the will as he has here."

In Frisbie's Estate, 266 Pa. 574 (1920), a case under the Act of 1909, testator left to survive him a widow but no issue, and by the terms of his will gave an estate to his wife for life and provided for the distribution of the remainder after her death to those who would be entitled to receive the same under the Intestate Laws of Pennsylvania. The widow elected to take under the will and also sought to have her $5,000 set aside. On appeal from an appraisement and the setting aside of certain property, the Supreme Court held that as distribution under the Intestate Laws could not arise until after the widow's life interest ended, she had no present right to the allowance and the lower court was justified in setting aside the appraisement.

In Carrell's Estate, 264 Pa. 140 (1919), a case under the Act of 1917, testator left to survive him a widow but no issue, and by the terms of his will, made the following provision for his wife:

"I give and bequeath to my beloved wife, Maria Carrell, the interest in my estate that the Intestate Laws of the State of Pennsylvania directs."

The widow elected to take under the will and presented her petition for the appraisement of $5,000. The Orphans' Court dismissed the petition holding that the case did not come within the terms of Section 2 of the Act of the 7th of June, 1917, P. L. 429, and on appeal the decree was affirmed, Stewart, J. observing:

"The argument in support of appellant's contention, stated briefly, is, that inasmuch as the will makes the same distribution of the estate as would have followed by virtue of the statute had the husband died intestate, it results that there is an actual intestacy and that the appellant is thus brought within the provisions of the act that awards to the widow of an intestate the sum of $5,000. This proposition would call for consideration if a proper determination of

the case in hand in any way depended on its correct determination, but it does not so depend. This is not a case of intestacy, and since the Act of 1917 relates solely to the descent and distribution of the real and personal property of persons dying intestate, it can have no place in the discussion, except as by the will it measures the bounty given by the testator to the several beneficiaries thereunder."

The learned court intimated that the widow, as executrix, would be justified in claiming credit in her account for the sum of $5,000 plus her exemption, the will having directed the conversion of the entire estate into money for the purpose of distribution. The court further declared that no appraisement would lie under the terms of the act.

Constitutionality.

In Langerwisch's Estate, 267 Pa. 319 (1920), upon an appeal from the lower court in this case, already cited, the Supreme Court, per curiam, said:

"On this appeal the sole contention of the appellant is that the amending act is unconstitutional in that it violates Section 3 and Section 7, Clause 16, of Article 3, of the Constitution. It is entitled "An Act to amend Section 2, Clause a, of the Intestate Act of one thousand nine hundred and seventeen, approved June 7th, one thousand nine hundred and seventeen, by inserting in the proviso to said clause the words "as to said five thousand dollars in value." This title contains but one subject which is "clearly expressed," and the act is a general law, not a local or special one, "changing the law of descent or succession." This is too plain for discussion."

In decisions construing the Act of 1909, to which reference has been made in this article, it was held that the interest allowed to the spouse became vested immediately upon the death of the decedent and that the act was a part of the statutes of descent and distribution. This ruling is applicable to the Act of 1917. It was determined under

the former act that the issue referred to was the issue of the decedent and not the survivor, and that the right of the husband or wife in the estate of the other was in no wise affected by whether the survivor had issue, but the sole question was whether the decendent left issue. This ruling would likewise be applicable to the present act. If the decedent left no actual issue, but children adopted, it was held that the allowance would not be awarded under the Act of 1909. It is submitted that this ruling would likewise apply to the present act.

Non-Residence.

Section 25 of the Intestate Act of 1917 states that its provisions are not to be construed as extending to the personal estate of an intestate whose domicile at the time of his death was out of the Commonwealth.

But this provision does not affect real estate located in Pennsylvania belonging to a foreign decedent.

In Adams's Estate, 45 C. C. 263 (1916), Hargest, Deputy Attorney General, rendered an opinion to the latter effect where a resident of New York died leaving real estate in Pennsylvania, and, by reason of there being no issue surviving the decedent, the widow claimed under the provisions of the Act of 1909.

In Paul's Estate, 46 C. C. 33 (1917), it was held that a non-resident husband may take against his wife's will the allowance of $5,000, according to the Act of 1909, out of the real estate of the wife located in Pennsylvania, and if the executor refused to proceed with the appraisement it could be done by an administrator c. t. a. appointed in Pennsylvania.

These two rulings would be applicable to the Intestate Act of 1917.

Forfeiture.

Section 5 of the Intestate Act of 1917 provides that a

husband who, for one year or upwards previous to the death of his wife, has wilfully neglected or refused to provide for her, or who has for the same period wilfully and maliciously deserted her, shall have no title or interest in her real or personal estate after her decease, and Section 6 of the same act provides that a wife who, for one year or upwards previous to the death of her husband, shall have wilfully or maliciously deserted him, thereby forfeits any title or interest in his real or personal estate after his decease.

In Shaw's Estate, 54 Superior Ct. 441 (1913), it was held that where a husband through drunkenness had neglected to provide for his wife during the last year of her life, was properly excluded from sharing in her estate and would, consequently not be entitled to anything under the provisions of the Act of 1909.

In Threadgold's Estate, 45 C. C. 151 (1917), it was contended that a widow who remarried prior to making claim for $5,000 under the Act of 1909 was, by reason of the remarriage, not entitled to the benefits thereof. It was held that this section did not militate against the petitioner.

In Arnout's Estate, 5 D. & C. 44 (1924), it was held that where a wife voluntarily and with the assent of her husband withdrew from the common domicile, such withdrawal did not involve wilful and malicious desertion, and therefore in case of the death of the husband, intestate and without issue, the widow was entitled to the allowance of $5,000 under the Intestate Act of 1917.

Appraisement.

In looking over the Act of 1909 and its supplements, together with the decisions of the courts thereon, respecting the mode of appointment of appraisers for the valuation of $5,000 share, much confusion and uncertainty is noted. However, Section 2 (b) of the Intestate Act of 1917 is free from all doubt on this matter, reading as follows:

"The appraisement and setting apart of the said $5,000 in value of property shall be made by two appraisers, who shall be appointed by the Orphans' Court having jurisdiction of the accounts of the personal representatives of such intestate, and shall be sworn or affirmed to appraise the property which the surviving spouse shall choose under the provisions of this Act."

In Desmond's Estate, 28 D. R. 231 (1918), there is quoted in full a form of petition for appointment of appraisers, together with the decree of court embodying the issuance of a rule to show cause why appraisers should not be appointed and answer to the rule. The pleadings raised two questions; first, whether the representative of the deceased widow of a decedent was entitled to claim the $500. exemption, and secondly, whether the estate of the widow was entitled to the $5,000. The facts were that the widow of the decedent died before any claim was made either for the exemption or the allowance. Said Maxwell, P. J. of the Orphans' Court of Bradford County, inter alia:

"The controlling distinction between the law relating to the $500 exemption and the $5,000 allowed to widows under the Act of 1917 is that the $5,000 worth of property real or personal, vests in the widow at the death of her husband and does not require any action on her part to secure the same. The $500 exemption does not vest at the death of the husband, but only when she has elected to exercise the right, and this her executor or administrator cannot do for her after her death."

In Troutman's Estate, 30 D. R. 708 (1920), the court, per Barnett, P. J., of the Orphans' Court of Perry County, after quoting Section 2 (b), said:

"No appeal is given from the report of the appraisers. They are the tribunal created by the act for the purpose of appraising property a spouse elects to take under this section, and in the absence of fraud or collusion, or of such clear undervaluation of the property as may suggest fraud

or collusion, their valuation should not be interfered with: Vandevort's Appeal, 43 Pa. 462; Davenport's Estate, 4 Kulp 255; Washington's Estate, 24 Lanc. L. R. 247; Gerz's Estate, 28 Lanc. L. R. 397; Menoher's Estate, 5 Westmoreland L. J. 21."

Section 2 (c) of the Intestate Act provides for notice of the appraisement to be given by advertisement or otherwise as may be prescribed by rules of the Orphans' Courts and after due proof thereof, the court may then confirm the appraisement and set apart the personal or real estate, or both, to the surviving spouse, subject, however, in case the appraisement is made in advance of the distribution of the estate to claims of creditors and also to lien of debts of the decedent.

The draftsman says that this is a new clause introduced in order to give the Orphans' Court express power to set apart property claimed by the surviving spouse, in advance of the distribution of the estate.

Clauses (d) and (e) of Section 2, are adaptions of Sections 1 and 2 of the Act of July 21, 1913, P. L. 872, with the language so changed as to apply to cases of allowance where there is more than one parcel and no single parcel is worth $5,000, but all of them are worth more than that amount. The language is also made to cover cases where part of the $5,000 is taken in personal property and the amount claimed out of real estate is therefore less than $5,000. There is also precise specification as to a sale of the real estate where the spouse refuses to take at the appraisement or fails to make payment of any excess over the appraised value.

In Troutman's Estate, 30 D. R. 708 (1920), the real estate consisted of three tracts, and the petition of the widow was to have the real estate to the value of $5,000 appraised and set aside to her use. The widow elected to take Tract No. 2 and if that were insufficient to cover the claim, Tract No. 1. The appraisement of Tract No. 2 was $400. and that

of Tract No. 1 was $9,500., and in the report of the appraisers, it was stated that Tract No. 1 could not be divided. The brothers and sisters of the decedent contended that the widow could not take both Tract No. 2 and Tract No. 1, when the latter alone was valued at more than $5,000. Barnett, P. J., in dismissing the exception, quoted Section 2 (d), observing:

"Nowhere in the act is there any restriction upon the freedom of its beneficiary to choose the property of the estate he or she will take in satisfaction of this portion of the inheritance it provides, but, on the contrary, the act expressly directs that the portion shall 'be chosen by him or her from real or personal estate, or both'."

Section 2 (f) is a new clause stated by the draftsman to be introduced to include the right to the income of the property set apart to the surviving spouse from the date of the death of the intestate. This clause specifies also that in case of the surviving spouse failing to pay the excess over the amount of the allowance, and the property thereupon is sold, there shall be deducted from the sum to be paid to said surviving spouse out of the proceeds of such sale, a proportionate part of the rents and income of such real estate received by such surviving spouse.

In Sexton, Guardian, vs. Magsan, 29 D. R. 250 (1919), a case arising under the Acts of April 1, 1909, P. L. 87, and July 21, 1913, P. L. 872, a farm was appraised in excess of $5,000 and the widow refused to accept the same and pay the excess, a sale of the farm was then ordered and in determining the question of the disposal of the rents, issues and profits from the farm, McPherson, P. J., said:

"The proportion of the net rents and profits of this land due to the widow from the date of the vesting of her $5,000 interest—the date of the death of her husband—is fixed by the proportion that the value of the widow's interest, viz., $5,000, bears to the appraised value of the land, viz., $6,200, or 50-62nds thereof. In addition, she is entitled

to 6-62nds as the life tenant of the remaininig interest in the real estate, under the general intestate laws.

She is, therefore, entitled in all to 56-62nds or 28-31sts of the net rents and profits for the years 1917 and 1918, or the sum of $588.56."

In Mitchell's Estate, 2 D. & C. 509 (1922), the real estate consisted of a dwelling house and lot where a decedent and her husband resided. The contents of the house appraised at $3119.75 were set aside for the husband, and the real estate was sold for $8,000 and the sum of $1880.25 from the purchase money was set aside for the surviving spouse to make up the $5,000 claimed by him. It was held that the husband was entitled to the rents accruing from the premises insofar as such rents were realized from the use of the personal property as set apart for him and to his disposal part of the rents from the use and occupancy of the premises. It was also decided that there should be no deduction for expenses of the appraisement but that the fund of $5,000 would be property chargeable with the two per cent inheritance tax.

The concluding clauses (g) and (h) of Section 2 provide for the taking of real estate which may be located in another county other than that in which the intestate was domiciled at the time of his or her death, and also provides for the procedure in the taking of real estate which is divided by county lines. Provisions are also inserted for the recording of the decree of appraisement by certified copy in the office of the Recorder of Deeds of each county wherein such real estate shall lie.

Conclusion.

The Act of 1909, referred specifically to the right of the widow of an intestate but, as construed by the courts, permitted the widow to take the $5,000 where there was no issue in the case of either intestacy or election against the will. By further construction, the husband of a testate

wife dying without issue, might take the $5,000 by election against the will, but not in case of intestacy. The present act accords the right of allowance to both spouses in case of intestacy, but denies the right to the allowance in case of election to take against the will of the deceased spouse. The draftsman of the act gives this explanation:

"A result of the Act of 1909 in connection with prior legislation is that a married person having no issue whose estate amounts to $5,000 or less, cannot make any testamentary disposition of his or her estate. The Commissioners recommend in this section that the special allowance of 1909 shall be made only in cases of actual intestacy, and not where the surviving spouse elects to take against the will of the deceased spouse."

The reason assigned is inadequate to justify such a distinction between testacy and intestacy when the rights of the spouses are concerned. As has been described, the distinctions made in the Act of 1909, as construed by the courts, were confusing. The trend of inheritance legislation as regards the spouses has been towards equality, and the Act of 1917 has made great strides in this direction. It would have added to the simplicity of the law as well as worked justice to both spouses to have avoided the distinction between testacy and intestacy and protected the allowance against any infringement by testamentary disposition. The right of the one spouse to the allowance should not rest upon the mere caprice of the other in the matter of will making. Furthermore, the abolition of this distinction between testacy and intestacy would remove the regrettable confusion between Section 2 (a) of the Intestate Act and Section 23 (a) of the Wills Act of 1917.

It is submitted that a change in the law giving the surviving spouse of a decedent dying without issue the $5,000 in both cases of testacy as well as intestacy is desirable in the interests of clarity and simplicity of the law and in justice to both spouses.

A. J. WHITE HUTTON.

MOOT COURT

HOLLAND VS. JENKINS

Wills — Construction — Estates — Meaning of Word, "Heir" — Failure of Heir — Act of July 9, 1897, P. L. 213

STATEMENT OF FACTS

X died devising his farm to his wife for life then to his son William and his heirs. If he has no heir then to his grandson, son of a deceased daughter. The testator died prior to the passage of the Act of July 9th, 1897, P. L. 213. William, plaintiff, has survived his mother and has contracted to convey the farm to Jenkins, defendant, who refuses to pay the price $3,000 because he will not get a valid fee.

Compton, for Plaintiff.

Embery, for Defendant.

OPINION OF THE COURT

Frankel. J. The question to be considered in the case at bar is: "What estate did William take under the will? Was it a fee simple estate or was it merely a life estate and was William by virtue of it being merely a life estate unable to pass good title?

By section 2, of the Act of 1897, it is provided that this act shall not apply to any deed, will or other instrument made before the first day of July, 1897. It therefore becomes incumbent upon the court to ignore the act of 1897 as far as the determination of the case at bar is concerned.

From the statement of facts it can clearly be seen that X, by his will intended a life estate for his wife, and the estate at the death of his wife, was to go to his son William. Now the question arises, what was the intention of the testator as to the disposal of this property to William. Did he intend that in case William did not survive the testator's wife, the property was to go to William's heirs or to the son of the deceased daughter.

It is the opinion of the court that the testator intended a life estate to his wife and then a fee simple to William if he survived his wife. The courts will strive to construe the intention of the testator as closely as is possible, but also strive to vest an estate absolute, if it is the opinion of the court that the testator so intended.

Mr. Justice Sharswood, in Mickley's Appeal, 92 Pa. 514 very ably states, "If a bequest be made to a person absolute in the first instance and it is provided that in the event of death or death without issue another legatee or legatees shall be substituted to the share or legacy there given, it shall be construed to mean death or death without issue before the testator."

This can very readily be applied to the case at bar. It is the opinion of the court that William can convey good title by virtue of the will.

In view of the foregoing, we decree judgment in favor of the plaintiff for $3,000 and costs.

OPINION OF SUPREME COURT

The gift was to William and his heirs. Heirs means heirs of the body, issue, for the gift over in default of heirs, is to a grandson, son of a deceased daughter. The gift then is to William and the heirs of his body; or (now) his heirs in the widest sense

We understand the want of heirs to be one accruing at any time in the future, not simply, at William's death. A provision for such lapse of heirs at any future time has no effect on the character of the estate. It does not reduce it from a fee simple to a fee determinable. William, therefore, is able to give a fee simple to the defendant and is entitled to the price agreed upon, $3,000, Horton vs. McCall, 233 Pa. 205.

The learned court below has reached a similar result by a somewhat different route. The judgment is therefore affirmed.

HAMMOND VS. HALLECK

Mines and Mining — Upper and Lower Seams of Coal — Lease — Surface Support — Removal of Pillars — Terms of Lease

STATEMENT OF FACTS

X owned a large tract of land in which were two veins of coal, one above the other, at a distance of 30 feet. He sold all the coal in the lower vein with the duty to remove it in 20 years, to Halleck. The land, subject to Halleck's right, he transferred to the plaintiff, Hammond, who mined the upper seam. After taking all the coal in the lower seam, except the pillars left to sustain the ground above, Halleck began to rob these pillars, with the result that the mining operations were interfered with by the caving. This is a bill for an injunction against the further removal of the pillars. Defendant

claims the right to all the coal in the seam, and that the plaintiff's remedy, if any, is an action for damages.

Berman, for Plaintiff.

Bernstein, for Defendant.

OPINION OF THE COURT

Blaugrund, J. The presumption is that the right of support exists and clear evidence is necessary to support a claim to the contrary, and this law is fundamental throughout this state.

The sole question to be determined is the intention of the parties at the time the contract between Halleck and the owner had been entered into. Can we justly say that the owner's intention was for Halleck to mine the coal and leave no support? To abide by the above statement would practically make the upper seam valueless to the second purchaser. Surely this meaning could not be read from the contract, bearing in mind that the onus rests with the defendant in such a case as this.

The owner of land has a natural right to support not only for his land from neighboring land, but an owner of the surface land has a natural right to support from subjacent soils or minerals in the absence of express stipulation to the contrary. I fail to read such an intention from the terms of the contract.

We have precedents in 120 Pa. 485 and 200 Pa. 474 which hold that the plaintiff has a right to the subjacent support of his mine and surface, and if necessity demands tc remove the pillars, the defendant must provide sufficient support (artificial) to remedy their removal.

As the plaintiff in his brief stated, the damages would be inestimable. We are of the same opinion. The plaintiff started the mining operations at a great expense, involving much time and labor. If this injunction were refused, the detriment to plaintiff would far overwhelm any benefit which might be given to defendant. It would cause the cessation of plaintiff's mines and place in jeopardy the lives of all workers on above surface. In 18 R. C. L. 141 the law is stated precisely and tersely that where there is a threatened injury to a mine of an irreparable nature, and which may cause inestimable damages, an injunction will be granted. I am of the opinion that this doctrine applies to the case at bar.

In 200 Pa. 474 the court decrees that the statute of limitations starts to run at time of excavation. Suppose no actual damage were incurred till after six years of this time. I think that such an incident should and will be protected by a court of equity. This is in furtherance of that equitable maxim—that equity is justice.

Therefore we grant the petition for the injunction restraining the defendant from removing the remaining pillars.

OPINION OF SUPREME COURT

The sale of "all the coal" in the lower seam, did not warrant the letting down of the superincumbent strata. The purchaser of the coal could remove all the coal, only if he supplied other equivalent support.

As no artificial supports were kept, and as the removal of the pillars would cause the caving in of the super-jacent ground and coal, it is right that it be prohibited by injunction, Lenox Coal Co. vs. Duncan-Spangler Coal Co., 265 Pa. 572.

The appeal is therefore dismissed.

COOPER VS. FOSTER

Evidence — Materiality of Witness' Prior Statements Which He Changes and Disaffirms as to Their Truth, in a Trial — Evidence of Prior Statements Irrelevant and Inadmissable to Prove Guilt of Defendant

STATEMENT OF FACTS

Assault and battery. X had appeared before the grand jury and sworn to the guilt of Foster. The grand jury found the indictment a true bill. At the trial, the Commonwealth calls X as a witness. He surprised the District Attorney by saying that he has no knowledge of the affair. The plaintiff then offers a grand juror to testify concerning X's evidence before the grand jury; also P, to testify that in the attorney's office, just before the trial, X had stated that Foster committed the assault. The court refused to hear this testimony. Result. verdict of not guilty. Appeal.

Marino, for Plaintiff.

Rubin, for Defendant.

OPINION OF THE COURT

Scott, J. In the case at bar the appellant contends that the learned court below erred in refusing to hear the testimony of the grand juror and of P. regarding X's statements as to the guilt of the accused, which X has made respectively before the grand jury and in the attorney's office prior to the trial and prays for a new trial because of the alleged error of the trial court.

Both parties seem to regard the two rulings of the court below— the exclusion of the grand juror's testimony and that of P — as distinct and separate points to be decided by this court on appeal. We think, however, that both can be decided by the application of the

same principles of evidence and that it is of no moment in the present case that one excluded witness is a grand juror and the other was serving in no capacity other than one who overheard the statement of X.

In Wigmore's Greenleaf on Evidence, 16th Ed., page 25, are set forth two fundamental axioms or principles applicable to all kinds of issues and the whole process of proof; (a) No fact not having probative value is admissible; (b) every fact having probative value is admissible, except so far as excluded by some specific rule of policy or tradition. One of the basic rules of evidence, then, is that the evidence to be admissible must be relevant to the issue.

On the trial the witness X testified that he had no knowledge of the affair. His testimony, then, can afford no basis for the conviction of the accused. If his prior inconsistent statements are admitted into evidence through the testimony of the grand juror and P, what purpose is served? Does the inconsistency of X's statements tend to prove Foster's guilt? No. The appellant admits in the case of P's testimony that "If the testimony would tend to prove the existence of a fact asserted by such evidence, it would be quite logical to exclude the statement by the witness who heard the witness make the assertion"—and we can see no difference in this regard between P's testimony and the grand juror's. And yet for what other purpose would such testimony be relevant? The only other purpose of admitting it to evidence the inconsistency of X's testimony is to prove that X is an untrustworthy witness. But that is irrelevant. It would serve no proper purpose and would tend to confuse the issue — the innocence or guilt of Foster.

In Sturgis vs. State, 2 Okla. Cr., 362, Wigmore's Cases on Evidence, 2nd Ed., p. 350, Furman, P. J., says: "Such contradictory statements are permissible alone for the purpose of impeaching the witness and are not original substantive evidence" and further "Such contradictory statements are in no case to be considered as original evidence against the adverse party."

Professor Wigmore in Greenleaf on Evidence, 16th Ed., Sect. 461f, p. 590, says: "It is universally accepted (and no citations are necessary) that the prior inconsistent statement is not to be taken as affirmative evidence of the fact stated in it for it is not offered as a testimonial assertion but only as inconsistent with the present statement."

The appellant cites the case of Gordon vs. Commonwealth, 92 Pa. 216 as a case in point. That case, it seems to us, is clearly distinguishable from the case at bar. There the prosecutrix swore on cross-examination that she did not testify to certain facts when before the grand jury. The defendant called the foreman of the grand

jury to prove what she did testify before the grand jury. The grand juror was excluded but this was held to be an error by the Supreme Court, which held that the juror was competent to show that the witness had sworn to another state of facts on another occasion. The purpose of impeaching the witness was to lessen her credibility as a witness, not to tend to prove the guilt or innocence of the defendant in that case. It was desirable and proper there to lessen the weight of her testimony. Here no proper purpose could be subserved by such impeachment of X. X testified that he does not know. He neither affirms nor denies Foster's guilt and the fact that he made a prior statement inconsistent herewith is irrelevant.

The motion for a new trial is refused and the judgment of the learned court below is affirmed.

OPINION OF SUPREME COURT

In this case, Cooper, the plaintiff, has been disappointed by the refusal of a person to testify for him as to Foster's, the defendant's, assault. He had said in the absence of the defendant. that he (def.) was guilty. He (def.) could not be affected by such a statement. When called as witness, he denied knowledge. It matters not that he convicted himself of former falsehood. When exposed to cross examination, in the suit against Foster, he gives no evidence. As the learned court below has said, that he contradicted former statements by him, is entirely irrelevant. Had the court heard the testimony, it would still have remained true that he did not testify against the defendant.

The judgment of the learned court below is affirmed.

SNYDER VS. X BANK

Banks and Banking — Checks — Forgery — Delay of Depositors in Using Means to Discover the Forgery — Delay in Giving Notice

STATEMENT OF FACTS

Snyder was depositor in X bank. Bank charged against his account the amount of two checks for $1,000 and $1,200 respectively. One of the checks was forged, the other check was genuine but the name of the payee was forged. Although the bank book of Snyder was settled twice from which he might have learned of the forgeries, he did not in fact learn of them for three months. He then objected to the payment made by the bank. This is assumpsit for $1,000 and $1,200 and interest. The court held that the delay in notifying the

bank of the forgeries precluded a recovery, although the bank did not show how any loss would accrue to it on account of the delay.

Lashley, for Plaintiff.

Lescure, for Defendant.

OPINION OF THE COURT

McInroy, J. There is no distinction in principle between the case of forged signatures and forging the payee. We can then consider it as one question.

The relation between a bank and its depositor is a contractual one. Its undertaking with its depositor is to pay his check if he has sufficient funds for that purpose, and it assumes all the risk as against him for mispayment and charging to his account a check which he has not signed or one he has signed bearing the forged indorsement of the payee. To his account it may not charge such a check. If it does, the depositor can recover from it the amount so charged. The responsibility of the bank is absolute and it can retain no money deposited with it by him to reimburse it for any mispayment it has made out of such deposit; but it can recover from the forger responsible for the instrument or from those who by their indorsement of a check have vouched for previous indorsements or genuineness of the signature of the alleged drawer, McNeely vs. Bank of N. America, 221 Pa. 588. We believe this correctly states the law as it exists today.

As soon as the plaintiff discovered the fact of the forgeries, he notified the bank. If he had delayed then, our question would have been more difficult to decide. This is exactly what happened in McNeeley vs. Bank. When the forgery is discovered, the ordinary person would immediately notify his bank. The court said in McNeeley vs. Bank that "delay on the part of the depositor leads not only to delay by the bank in proceeding against the forger, but also to possible loss of evidence, and to possible loss of opportunity of recovering the persons interested in the forgery. A delay of three months in giving notice to the bank after the discovery of the forgery will deprive the depositor of his right to recover the amount of the check from the bank." The same thing happened in Murray vs. Real Estate Title Insurance and Trust Company, 39 Super. 438, and the court gave a similar verdict.

In Meyers vs. Bank, 193 Pa. 1 and Leathers Mfg. Bank vs. Morgan, 117 U. S. 96, checks were altered by clerks and therefore by agents. They are not in point so we refrain from discussing them.

We have carefully examined the authorities and believe that the lower court erred in holding that the delay in discovering the forgeries precluded a recovery. The assignments of error are sustained

and the record is remitted to the lower court with the direction to grant a new trial.

OPINION OF SUPREME COURT

The plaintiff's bank book had been returned to him twice, with the checks, payment for which the bank was claiming credit. A considerable interval was between these two returns. For what reason are these returns made? Clearly to invite examination by the depositor into the correctness of the credits claimed. It is the duty of the depositor to make this examination. The checks are returned, credit for which is asked by the bank. It is negligence on the part of the depositor, to have these returned checks for weeks without taking the trouble to examine them. Had the duty of reasonably prompt examination been made, that a forgery had been committed would have been revealed. An early notice of that forgery to the bank it would have become the depositor's duty to make, if he had any intention to challenge the bank's right to a credit for the payments. Allowing a long time after discovery of the forgery, before giving notice, would have precluded the depositor's contention of the propriety of the payments by the bank, Commonwealth Trust Company vs. First Nat. Bank, 265 Pa. 60; McNeely vs. Bank of N. America, 221 Pa. 588; Murray vs. Title Insurance and Trust Co., 39 Super, 438.

For a similar reason, allowing too long a time to pass before the investigation of the returned checks which would have given the information that a forgery had been committed, is a delay whose results to the bank may be disadvantageous. As the depositor ought to give prompt information of the forgery, when he discovers, so he should promptly use the means for discovering whether a forgery has been committed, by using the facilities furnished by the bank, for discovering forgeries.

We are unable to reach the conclusion reached by the learned court below, and the judgment in favor of the plaintiff is reversed.

COMMONWEALTH VS. HENDRICKS

Criminal Law — Murder in First Degree — Killing in Attempting to Commit a Robbery — Actual Intent to Kill Unnecessary— Act of May 22, 1923, P. L. 306 Discussed

STATEMENT OF FACTS

Hendricks undertook to rob X of $50, which he was known to have in his pockets. Hendricks had a gun, which he displayed for the purpose of frightening X and inducing him to refrain from resist-

ance, but which he intended not to discharge. It however, was accidentally discharged and X was mortally injured, dying in three days. The unintended shooting dissuaded Hendricks from pursuing his purpose, and making no attempt to take the money he fled. He is on trial for murder.

OPINION OF THE COURT

Amdur, J. Hendricks is on trial for murder, and he raises the defence of lack of intention to kill, to reduce the crime from first degree murder to second degree murder. We cannot see how such a defence can be sustained.

Under the Act of March 31, 1860, P. L. 403, "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilfull, deliberate, and premeditated killing, or which shall be committed in the perpetration of or in **the attempt** to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree." The facts of the case at bar bring the case within the Act of 1860, and no intent to kill is necessary, to hold the defendant guilty of murder of the first degree.

In Commonwealth vs. Lessner, 274 Pa. 111, Justice Walling says that "Having shown a murder committed in the attempt to perpetrate a robbery, it was not necessary for the Commonwealth to go further and show other elements of murder of the first degree."

We must hold that the Act of 1860 applies, and the defence of lack of intention to kill is insufficient to reduce the degree of the crime from first degree murder to secnd degree murder, and hold the defendant Hendricks guilty of murder of the first degree.

OPINION OF SUPREME COURT

The Act of 1923 enacts that "all murder * * * which shall be committed in the perpetration or attempting to perpetrate any arson, rape, robbery, burglary or kidnapping, shall be deemed murder in first degree, and all other kinds of murder shall be murder in the second degree." See Prof. Hitchler's article in 29 Dickinson Law Review, p. 69.

The intention to kill is not necessary in order to make a killing, incidental to one of these felonies, murder. Rogers, J., remarks that the commission of the crimes mentioned, "involves such turpitude of mind, and protection against which was so necessary to the peace and welfare of all good citizens that our legislature considered the intention (to kill) as of no consequence and accordingly decreed death to be the penalty of such offences," Com. vs. Flanagan, 7 W. &

S. 415; Com. vs. Lessner, 274 Pa. 108. It matters not that the death was not intentional; or was even accidental, Com. vs. McManus, 282 Pa. 25.

Hendricks used a gun to assist him in effecting the robbery, not by killing the person to be robbed, but by frightening him into non-resistance. The use of the gun as a weapon to assist in the robbery, makes the defendant liable for the death of the victim, as for murder in the first degree. Affirmed.

Erratum:—The opinion of the court in the case, Bank vs. Hopewell, January 1926 issue, page 108, was written by Samuel Garfinkle.